Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	)	ET Docket No. 92-9

To: The Commission

REPLY TO APC'S OPPOSITION TO PETITION TO SUSPEND PROCEEDING

THE ASSOCIATION OF AMERICAN RAILROADS ("AAR"), LARGE PUBLIC POWER COUNCIL ("LPPC") and AMERICAN PETROLEUM INSTITUTE ("API") (collectively "Petitioners"), by their attorneys and pursuant to Sections 1.41 and 1.45 of the Commission's Rules, hereby submit a Reply to the Opposition filed by American Personal Communications ("APC") to Petitioners' Petition to Suspend Proceeding.[1/]

I. APC Agreed that the Commission Should Utilize Federal Government Spectrum in this Proceeding.

Although styled as an "Opposition," APC's pleading supported Petitioners' request that the Commission consider utilization of the 1710-1850 MHz federal government band ("Federal 2 GHz Band")

1/ Petitioners filed the Petition to Suspend Proceeding on April 10, 1992. APC filed its Opposition on April 20, 1992. Accordingly, this Reply is timely filed pursuant to Section 1.45 of the Commission's Rules.

in this proceeding.[2/] APC also supported one of the alternatives that Petitioners recommended the Commission investigate, namely, making federal government spectrum available as a potential relocation band for microwave users displaced from the 2 GHz band targeted for reallocation ("Commercial 2 GHz Band"). Opposition at 2. Moreover, APC agreed with Petitioners that the Commission has authority to initiate efforts to coordinate with the National Telecommunications and Information Administration ("NTIA") to release federal government spectrum and that NTIA has authority to release such spectrum without passage of spectrum reallocation legislation. Id. at 3, 4, n. 6. Significantly, APC endorsed the fundamental premise of the Petition: that the use of federal government spectrum could result in more rapid and less disruptive deployment of emerging technologies than the Commission's current proposal. APC takes issue, however, with Petitioners' request for the suspension of the comment dates in this proceeding.

II. The Commission Should Suspend this Proceeding to Meet its APA Obligation to Consider Information About Government Spectrum.

Given its acknowledgement of the potential benefits to be gained from using federal government spectrum in this proceeding, it is not surprising that APC has not disputed that the

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2/ See Notice of Proposed Rulemaking, FCC 92-20, released February 7, 1992 ("NPRM").

Commission is required under the Administrative Procedure Act ("APA")[3/] to fully investigate this alternative. The APA requires agencies to consider all alternatives and examine all relevant technical information before adopting new rules. See Center for Auto Safety v. Peck, 751 F.2d 1336, 1343 (D.C. Cir. 1985). Unless it examines all relevant technical data, an agency cannot meet the APA requirement that it provide a reasoned explanation, with a factual basis for choices made, when adopting new rules. See American Mining Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990).[4/]

During a rulemaking proceeding, an agency must respond to new information that would require a change in a proposed rule. See ACLU v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987). In this proceeding, the NTIA report, and its revelation about underutilization of federal spectrum, constitutes new information to which the FCC must respond. Accordingly, the FCC would violate the APA if it fails to consider this information or offers an explanation for its decision in this proceeding that is

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3/ 5 U.S.C. § 551 et seq.

4/ A reviewing court is generally at its most deferential when examining highly technical matters on which an agency, such as the FCC, has special expertise. See, e.g., Building and Const. Trades Dept., AFL-CIO v. Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988). However, a court cannot defer to the agency when the agency has not exercised its expertise. See Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986); Cities of Carlisle and Neola, Iowa v. FERC, 741 F.2d 429, 433 (D.C. Cir. 1984).

inconsistent with this information. See California v. FCC, 905 F.2d 1217, 1230 (9th Cir. 1990).

Finally, the FCC is justified in suspending the rulemaking until it considers the new information about federal government spectrum. See Sierra Club v. Gorsuch, 715 F.2d 653, 658 (D.C. Cir. 1983) (final rules deferred pending further study). Suspending the proceeding would permit the Commission to develop a complete and accurate record upon which to base a decision regarding its proposed rules. The complexity of the task currently before the FCC, the adverse impact of the proposed rules on the current users of the Commercial 2 GHz Band and the short period of time that has elapsed in this proceeding (i.e. the lack of delay thus far) justifies a suspension. See Cutler v. Hayes, 818 F.2d 879, 897-8 (D.C. Cir. 1987) (factors justifying administrative delay). See also National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1124-5 (D.C. Cir. 1984) (delay justified to permit state public utility commissioners to evaluate rate structures and comment to FCC).

III. Suspending the Rulemaking Will Not Delay Deployment of PCS.

APC contended that granting Petitioners' request to suspend the comment dates and immediately investigate use of federal government spectrum will "needlessly delay this proceeding." Opposition at 3. Without providing any supporting data, it claimed that "there will be time enough" between now and the

comment deadline "to consider the value of redesignation of government bands." Id.

Contrary to APC's assertion, an immediate investigation of the feasibility of using federal government spectrum to achieve the goals of this proceeding has the potential to result in more rapid deployment of emerging technologies than if the Commission proceeds with its current proposal. Indeed, if the Commission finds that NTIA will release available federal spectrum with technical characteristics suitable for emerging technologies, PCS could be deployed immediately. In the alternative, if the Commission finds that NTIA will release available federal spectrum as a relocation spot for commercial fixed microwave users, the myriad problems facing the Commission in relocating Petitioners' operations to other bands can be avoided.

Many of the contentious issues the parties will address in comments could become moot if the Federal 2 GHz Band is made available for PCS or as a new home for current users of the Commercial 2 GHz Band.[5/] Thus, logic dictates that this alternative be fully investigated as a first step. Following the course urged by Petitioners will conserve the scarce resources of both the Commission and the parties. Rather than spending their time and money engaging in a protracted rulemaking proceeding,

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5/ For example, all of the questions posed by the Commission in its NPRM regarding the adequacy of higher bands for purposes of relocation will become moot if the Federal 2 GHz Band is made available for PCS or as a new home for displaced users of the Commercial 2 GHz Band.

the current users of the Commercial 2 GHz Band, PCS proponents, the FCC and NTIA should be working cooperatively to make underutilized government spectrum available so that emerging technologies can be deployed in the most cost-effective and expeditious manner possible.

Contrary to APC's insinuation, Petitioners have no interest in, and nothing to gain from, a "needless delay" of this proceeding. As extensive users of communications systems that are vital to their nationwide operations, they, like PCS entrepreneurs, desire predictability for both immediate and long-term planning. Petitioners in no way seek to prolong the unpredictability that is inevitable until this reallocation proceeding is resolved. The procedure Petitioners advocate -- immediate investigation of using federal government spectrum -- is aimed at facilitating deployment of new technologies as expeditiously as possible with the least amount of expense and harm to all parties.[6/]

6/ In its Opposition, APC cites statistics regarding deployment of cellular services to project potential economic loss the nation will suffer if deployment of PCS is delayed by suspending the proceeding to investigate use of federal government spectrum. Opposition at 6. Petitioners have shown, however, that immediate investigation of this alternative will not significantly delay deployment of PCS. Moreover, the economic impact of the Commission's current proposal on current users, and the nation as a whole, also must be considered.

IV. OET Analysis of Federal Government Spectrum Is Necessary to Evaluate Its Potential Use for PCS or Displaced 2 GHz Users.

APC questioned the utility of requiring OET to analyze the Federal 2 GHz Band in the same manner in which it analyzed the Commercial 2 GHz Band targeted for reallocation. Opposition at 4, n. 7. However, an OET analysis of the Federal 2 GHz Band is necessary before parties can comment on its usefulness in this proceeding.[7/] As fully discussed at pages 7-11 of the Petition, the feasibility of using the Federal 2 GHz Band as either a home for PCS or as a relocation band for users of the Commercial 2 GHz Band cannot be effectively determined unless OET analyzes it in the same manner it analyzed the bands now under consideration for these uses. It is impossible to make a valid comparison and an informed decision unless all the frequency bands are analyzed using the same methodologies and criteria.

APC apparently believes that there is sufficient information in the NTIA report for parties to comment on the Federal 2 GHz Band. Opposition at 4. The information in the NTIA report, however, is limited to unclassified facilities operating on federal government frequencies. Unlike Petitioners and the other

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7/ APC concedes that parties should comment on the appropriateness of using the 1710-1850 MHz federal band for PCS. Opposition at 4. It claims that Petitioners' "premature comments" on this issue should be rejected. Id. Petitioners did not intend to "comment" on the appropriateness of using the federal band. In fact, as the Petition and this Reply make clear, no parties can effectively comment on use of the Federal 2 GHz Band until the FCC studies this alternative and expressly presents it as an option for consideration.

federal government frequencies. Unlike Petitioners and the other parties, FCC officials have the necessary clearances to access classified information on government spectrum usage. With this additional information, OET can adequately determine the availability of federal spectrum for this proceeding.

As noted earlier, APC's assertion that an OET study of the Federal 2 GHz Band will excessively delay this proceeding is unfounded. As APC recognized, the NTIA report eliminates much of the groundwork undertaken by OET in connection with the other bands it analyzed. In addition, the data bases and analytical methods OET will use in this study already are in place from its initial study. Accordingly, it is clear that an OET study of the Federal 2 GHz Band will not significantly delay the resolution of issues in this proceeding. Even assuming, arguendo, that there would be a slight delay, it would be amply justified by the potential benefits to be gained from using federal government spectrum either for PCS or as a relocation band for displaced users of the Commercial 2 GHz Band.

V. NTIA Will Not Be Forced to Release Excessive Federal Spectrum.

APC claims that Petitioners "gloss over" the significance of S. 218, the proposed legislation that would require NTIA and the FCC to identify underutilized federal government spectrum that can be reallocated for emerging technologies. Opposition at 4, n. 6. APC claimed that "the federal government has a legitimate

interest in retaining sufficient spectrum to permit government users to continue to operate effectively" and that the federal sector may lose up to 430 MHz of spectrum if it voluntarily releases spectrum to the FCC in this proceeding and then is required to release spectrum pursuant to S. 218. Id.

APC mischaracterizes NTIA's potential loss of control of government spectrum if S. 218 is enacted. S. 218 explicitly states that the only federal government frequencies that will be eligible for reallocation for commercial use are those that, inter alia, (1) "are not required for present or identifiable future needs of the Federal Government," and (2) "can feasibly be made available" within two to 15 years.[8/] In fact, the bill would require NTIA's active participation, together with the FCC, in determining which federal government frequencies meet the many criteria for reallocation for commercial use.[9/] Moreover, the bill would not "require" reallocation of 200 MHz of spectrum, but would set such reallocation as a target if NTIA and the FCC can identify that amount of spectrum as meeting the bill's reallocation criteria. Thus, if NTIA makes spectrum available before passage of the legislation, it will not be required to

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8/ See S. 218, Section 4(a).

9/ Testimony by former NTIA Director Janice Obuchowski and former Commerce Secretary Mosbacher indicates the Administration's strong support for reallocating federal government spectrum for emerging technologies such as PCS. The Administration's only objection to the proposed legislation is that it does not authorize reassignment of the spectrum through competitive bidding.

reallocate additional spectrum unless such spectrum also is not needed for federal government use. In sum, passage of S. 218 poses no barrier to the approach Petitioners have advocated in this proceeding.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that their Petition to Suspend Proceeding should be granted.

Respectfully submitted,

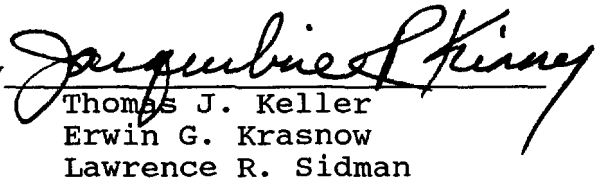
THE ASSOCIATION OF AMERICAN RAILROADS

By _____
Thomas J. Keller
Erwin G. Krasnow
Lawrence R. Sidman
Jacqueline R. Kinney

VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6060

Its Attorneys

LARGE PUBLIC POWER COUNCIL

By 

Thomas J. Keller
Erwin G. Krasnow
Lawrence R. Sidman
Jacqueline R. Kinney

VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6060

Its Attorneys

AMERICAN PETROLEUM INSTITUTE

By 

Wayne V. Black
Rick D. Rhodes
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

April 24, 1992

CERTIFICATE OF SERVICE

I, Carol M. Cantrell, a secretary for the law firm Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, do hereby certify that a true and correct copy of the foregoing "Reply to ACP's Opposition to Petition to Suspend Proceeding" was delivered by hand, this 24th day of April, 1992, to the following:

Chairman Alfred C. Sikes
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Sherrie P. Marshall
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Andrew D. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Dr. Robert M. Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Gerald P. Vaughn, Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Cheryl A. Tritt, Esq.
Legal Advisor to the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Kenneth Robinson, Esq.
Legal Advisor to the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Ralph Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Dr. Thomas P. Stanley, Chief
Office of Engineering & Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Dr. Bruce A. Franca, Deputy Chief
Office of Engineering & Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Thomas J. Sugrue
Acting Assistant Secretary
National Telecommunications
and Information Administration
Herbert C. Hoover Building
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Jonathan D. Blake, Esq.
Kurt A. Wimmer, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

Jeffrey L. Sheldon, Esq.
Sean A. Stokes, Esq.
Utilities Telecommunications Council
1140 Connecticut Avenue, N.W., Suite 1140
Washington, D.C. 20036

Carol M. Cantrell